IN ARBITRATION PROCEEDINGS PURSUANT TO
AGREEMENT BETWEEN THE PARTIES

In the Matter between	
COUNTY OF SANTA CLARA, Employer	County No. 98-051-DSA-004
and	ARBITRATOR'S DECISION AND AWARD
DEPUTY SHERIFFS ASSOCIATION OF SANTA CLARA COUNTY, Employee Organization	June 15, 2000
Involving issues related to procedural arbitrability, [named redacted], Grievant	

APPEARANCES:

On behalf of the Employee Organization:

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On behalf of the Employer:

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BEFORE:
Bonnie G. Bogue
Arbitrator

Arbitrator's Case No. 57300A-G1a

PROCEDURAL BACKGROUND

This arbitration, involving the grievance of [named redacted], hereinafter the Grievant, arises pursuant to the agreement between the DEPUTY SHERIFFS ASSOCIATION, hereinafter the Association, and the COUNTY OF SANTA CLARA, hereinafter the Employer or County, and under which BONNIE G. BOGUE was selected as Arbitrator, and under which this award is final and binding on the parties.

A hearing was convened on February 4, 2000, at which time the County raised a procedural arbitrability defense to one of the two grievances which the Association was seeking to arbitrate. When the County declined to submit the arbitrability question to the undersigned Arbitrator, and the Association declined to proceed on the merits of the one grievance which the County did not contend was not arbitrable, the proceeding was recessed. The Association indicated it would seek a court order compelling arbitration. Subsequently, upon stipulation of the parties, the question of arbitrability was submitted to the undersigned Arbitrator for determination at a hearing held April 4, 2000, in San Jose. At this evidentiary hearing, the parties availed themselves of the opportunity to call witnesses and present evidence and argument. Witnesses were duly sworn. A verbatim record of the hearing was prepared, and a transcript was made available. The record was closed on May 31, 2000, post-hearing briefs having been received by the Arbitrator as of that date, and the matter submitted for decision. The parties further stipulated that, if the grievance is found arbitrable, they will submit the merits of that grievance to me for decision on July 25 and 26, 2000. (RT 5-6).[1]

[1] Citations are to pages of the reporter's transcript for the April 4, 2000, hearing.

STATEMENT OF THE ISSUE

The parties stipulated at the hearing to the following statement of the issue to be determined: Is grievance No. 98-051-DSA-004 arbitrable?

POSITIONS OF THE PARTIES

The County contends that this grievance is not arbitrable because the Association failed to move it to Step Two - Arbitration under the provisions of the negotiated grievance procedure. It contends that only the related grievance involving the same Grievant was properly moved to arbitration. The County rejects the contention that it waived its right to claim this grievance is not arbitrable by the manner in which it dealt with the Association on the related grievance through settlement discussions and in moving the matter to arbitration.

The Association contends that all correspondence and settlement discussions with the County dealt with both grievances and that the County never claimed that the matter had not been properly advanced to arbitration until the day before the scheduled date of the arbitration hearing. It contends that the County is estopped from raising that procedural objection at the arbitration step. It claims that the Association's Board approved moving both matters to arbitration and that the attorney then representing the Association was not aware that only Grievance No. 003 was cited in the appeal to Step Two. Throughout the processing of the grievances, including settlement discussions, the County made material representations that both grievances were being addressed, as reflected in the captions on all correspondence coming from the County. It contends

that the arbitral policy against forfeiting of grievances for procedural error warrants finding this grievance arbitrable.

DISCUSSION

The County argues that this grievance is not arbitrable because the letter moving the [ ] grievance to arbitration (G.Ex. 3) only cited the "court assignment" grievance No. 98-005-DSA-003 (hereinafter No. 003). No comparable letter was ever sent by the Association regarding his second grievance No. 98-051-DSA-004 (hereinafter No. 004), the "patrol training officer" grievance, that was filed shortly thereafter. The grievance procedure in the contract states at Sec. 23(c):

> Step Two
>
> If the Association is dissatisfied with the step one decision, the grievance may, within ten (10) working days of receipt of the step one decision be submitted by the Association to arbitration by informing the County Executive or designated representative in writing.

Despite the failure of the Association to submit written notification that it intended to submit grievance No. 004 to arbitration, the evidence is clear that in all dealings between the parties regarding Grievant [named redacted], both grievances were under consideration together. Testimony indicates that the discussions regarding possible settlement of [named redacted]'s disputes "focused" on the court assignment grievance (No.003) as the central issue. However, there is no testimony that anyone from the County ever refused to address both of the Grievant's complaints in these discussions. Rather, the Association's attorney involved in this case prior to the arbitration hearing, [attorney named redacted], testified that he continued to understand that both matters

were the topic of the settlement discussions with the County representative, [named redacted], and that it sought resolution of all of [Grievant's]'s complaints. When the initial arbitration, set for March 24, 1999, was cancelled to allow the parties to pursue settlement discussions, [Association attorney named redacted] asserted that the County did not at that time claim that only one of the two grievances was set for arbitration or that only one of the two grievance would be considered in the settlement discussions. (RT 32-34, 36-37; G.Ex. 14)

An Association officer testified that before grievances are moved to the arbitration step, that action is approved by the Association's governing board. He testified that there was no decision by the board not to arbitrate the second grievance at the time it approved moving [Grievant]'s grievances to arbitration. The officer said that, had a decision been made to arbitrate only one of the two grievances, that would have been noted in the board's minutes. The minutes themselves were not placed in evidence to show what may have been referenced about these discussions at the board meetings, but the witness testified that he reviewed the minutes to substantiate his own recall that no decision to drop [named redacted]'s second grievance had ever been made by the Association's board and had likewise confirmed his recall with members of the board. (RT 20-23, 25; G.Ex. 15).

More significantly, the County's own correspondence during the year and a half these grievances were pending prior to the first arbitration hearing on February 4, 2000, repeatedly cited BOTH grievances by number and name, whenever settlement or the arbitration was addressed. (Co. Exs. 1, 2; G. Exs. 5, 6, 10). At no time did any County

correspondence address only grievance No. 003, but cited them as if they were considered combined grievances in a single proceeding, including scheduling on two occasions an arbitration hearing for both grievances (the first in March 1999 and then reset for February 2000 after settlement efforts failed).

This conduct makes clear that the County never understood that the Association was only seeking to arbitrate grievance No. 003, but instead operated on the assumption that both of [Grievant's] grievances were being appealed. It had all of the paperwork available and with due diligence could have discovered the lack of a formal, written appeal to Step Two when the Association first entered into settlement discussions that encompassed both grievances.

This consistent conduct shows the Employer treated both grievances together, and was prepared to settle or arbitrate them both. Not until the day before the arbitration hearing, a hearing postponed for many months while settlements discussions were underway, did the County discover this procedural flaw. Only at the arbitration stage, the day before the February 4, 2000 hearing, did it notify the Association that it would refuse to consider grievance No. 004 as an active grievance because only grievance No.003 was cited in the written appeal to Step Two.

Failure to abide by contractual requirements for processing grievance may provide grounds for finding the grievance not arbitrable, since the parties have negotiated mandatory steps and deadlines for moving a grievance forward to binding

determination by an arbitrator. Here, the parties have required "written notification" rather than oral notice that the Association intends to arbitrate a grievance.

However, published arbitration cases and treatises on arbitration illustrate the reluctance of arbitrators to deny hearing a grievance when the procedural flaw is raised at the arbitration step and the Employer has otherwise processed the matter through to arbitration, as is the case here. Such conduct commonly is viewed as a waiver of the contractual right to refuse to arbitrate a grievance that has not been processed in compliance with the grievance procedure. As stated *Labor and Employment Arbitration*:

> Arbitrators are very reluctant to deny a hearing on the merits based upon a procedural error at this late stage of the grievance procedure. Indeed some interesting examples of contract interpretation have emerged from cases in which arbitrators have bent the contract in order to avoid what would otherwise defeat arbitrability. [] The thrust of these awards is that the grievance procedure is not an obstacle course designed to entrap the parties.[2]

In this case, the County suffers no prejudice by being required to arbitrate both grievances despite the Association's failure to move, in writing, grievance No. 004 to Step Two at the time it properly moved grievance No. 003 forward to the arbitration step. The matter did not lie dormant while the Association "sat on its rights" leading the County to assume the issue had been dropped. Rather, the County had proceeded right up to the eve of the arbitration, during many months of active discussion, on the assumption that both grievances had been appealed to arbitration, including engaging in settlement discussions that were aimed at resolving all of [named redacted]'s

[2] *Labor and Employment Arbitration*, Bornstein and Gosline, eds.(Matthew Bender); vol. I, Chap. 8, "Challenges to Arbitrability"; Sec. 8.04[3].

complaints. The County was fully aware that the Association intended to arbitrate both issues if those discussions were not fruitful.

Therefore, the County by its conduct has waived its right to assert that grievance No. 004 is not properly at the arbitration stage by its consistent actions of treating both grievances as being moved in tandem to arbitration, and by plainly citing grievance No. 004 in all correspondence dealing with arbitrating [Grievant's] dispute. The County's arbitrability defense is rejected.

AWARD

Grievance No. 98-051-DSA-004 is arbitrable. The parties are directed to proceed with arbitrating the merits of this grievance.

Date: _____ _____

Bonnie G. Bogue
Arbitrator